

M e m o r a n d u m

To : Monte Williams, Administrator
Excise Taxes Division

Date: September 27, 1996

From : Janet Vining
Acting Assistant Chief Counsel

Subject: **Other Tobacco Products**

I am writing in response to your May 13, 1996 memorandum to Mary Armstrong, in which you request an opinion concerning the definition of "tobacco products" in Revenue and Taxation Code Section 30121(b). For the reasons set forth below, we agree with your position that the tax applies to all cigars, smoking tobacco, chewing tobacco, and snuff, regardless of the amount of tobacco they contain. In addition, the tax also applies to other articles or products that contain at least 50 percent tobacco. However, we disagree with your conclusion that a chewing gum that contains a small amount of tobacco would not be subject to the tax. Since the product is intended to be chewed, and it contains tobacco, it is chewing tobacco and is therefore subject to the tax.

Revenue and Taxation Code Section 30121(b) states that "tobacco products" includes, but is not limited to:

... all forms of cigars, smoking tobacco, chewing tobacco, snuff,
and any other articles or products made of, or containing at least 50
percent, tobacco, but does not include cigarettes.

You question the application of this definition to three specific products. The first, a product called "Pow-Wow", is distributed by Natural American Spirit. It is sold in twelve one-ounce pouches, and is described as an aromatic blend of American Spirit tobacco with sage, red willow, bearberry, and yerba buena, to be used for ceremonial pipe smoking. Natural American Spirit states that the product is 36% tobacco. The second product, "Ipco Snuff Paste", contains a package insert which describes the product as being 35% to 45% tobacco. The last product is a chewing gum manufactured by Star Tobacco Corporation which is approximately 5% tobacco.

The definition in Section 30121 can be interpreted in two ways, depending on whether the clause "made of, or containing at least 50 percent tobacco" is read to qualify all the items listed before it in the definition or only "any other articles or products". In interpreting this section, we can be guided by the manner in which similar language in federal law has been interpreted.

The federal definition of tobacco products, at 28 U.S.C. §5702(c), is similar to the first portion of our state law definition, and lists cigars, cigarettes, smokeless tobacco, and pipe tobacco. Unlike state law, there is no reference to "other articles or products". Cigars and cigarettes are separately defined (28 U.S.C. §5702(a) and (b)). Smokeless tobacco is defined as "any snuff or chewing tobacco" (28 U.S.C. §5702(n)(1)). "Snuff" is defined as "any finely cut, ground, or powdered tobacco that is not intended to be smoked", while "chewing tobacco" is defined as "any leaf tobacco that is not intended to be smoked" (28 U.S.C. §§5702(n)(2) and (3)). "Pipe tobacco" is defined as "any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco to be smoked in a pipe" (28 U.S.C. §5702(o)).

The federal Bureau of Alcohol, Tobacco and Firearms has interpreted the federal tobacco tax to apply to any tobacco products listed in the federal definition, regardless of the amount of tobacco present in the product. For example, the ATF imposed the federal tobacco tax on a chewing gum that was 2% tobacco, until the Federal Drug Administration prohibited the sale of the gum. The federal tobacco tax was imposed based on the entire weight of the gum. In that example, the ATF had interpreted "chewing tobacco" to include gum containing any tobacco. However, the federal tax does not apply to products which contain no tobacco (27 Code of Federal Regulations 270.11).

Consistent with the interpretation of federal statutes defining "tobacco products", we conclude that California's Cigarette and Tobacco Products Tax Law applies to all forms of cigars, smoking tobacco, chewing tobacco, and snuff, regardless of the amount of pure tobacco they contain. In addition, the tax applies to any other articles or products which are made entirely of tobacco or contain at least 50% tobacco, but excluding cigarettes.

Based on the above interpretation, all three of the products described in your May 13, 1996 memo and attachments are subject to the tobacco products tax. "Natural American Spirit" is a smoking tobacco, Ipco Snuff Paste is snuff, and chewing gum which contains tobacco is chewing tobacco. Since smoking tobacco, snuff, and chewing tobacco are listed in Section 30121(b), and each of the three products you described contains some tobacco, the tobacco products tax applies to all three products.

Please feel free to contact me if you have any questions.

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cc: Mr. Allan Stuckey
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